Dynamex Operations West. v. Superior Court











































SERVICES INSTITUTE FINANCIAL SERVICES
FIRMS AND INDEPENDENT FINANCIAL ADVISORS















































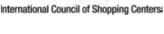
























































Redwood Companies











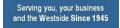












UPDATED

July 2, 2018

The Honorable Edmund G. Brown Governor, State of California State Capitol Sacramento, CA 95814

Members of the California State Legislature State Capitol Sacramento, CA 95814

SUBJECT: Dynamex Operations West. v. Superior Court (April 30, 2018)

The California Chamber of Commerce and the organizations listed below respectfully write to voice concern with the recent ruling by the California Supreme Court in Dynamex Operations West v. Superior Court ("Dynamex"), issued on April 30, 2018. The economic impact of this ruling has far-reaching negative implications for nearly all sectors of the economy. Companies in a wide range of industries throughout California will be exposed to costly litigation and will have limited resources to maintain their business. Innovation and investment in California's economy will be limited or reduced. And, individuals who intentionally rely upon contracting opportunities for income, will have limited options. We write to bring to your attention to the magnitude of this decision and encourage the Legislature and Administration to suspend or postpone the application of the *Dynamex* decision until all parties impacted by this decision can work together to develop a balanced test for determining independent contractor versus employee status that reflects the needs of California's economy and the workforce.

Summary of the *Dynamex* Decision:

Prior to Dynamex, California courts and state agencies had long applied what is known as the Borello test for determining whether a worker was an independent contractor for labor and employment purposes. Notably, the Borello decision was also a California Supreme Court decision and was referenced by the

California Labor Commissioner as the model to utilize for determining independent contractor status. See S.G. Borello & Sons, Inc. v Dept. of Industrial Relations (1989) 48 Cal.3d 341.¹ This flexible, multi-factor approach looked primarily at whether the hiring entity had a "right to control" the manner in which the worker performed the contracted service, along with eight other "secondary" factors, such as whether the worker was engaged in a distinct occupation or business, the skill required in the particular occupation, and whether the worker or the hiring entity supplied the tools used to perform the work and the place where the work was performed.

Despite the *Borello* test being used for nearly three decades in the employment context, the California Supreme Court made a surprising and unprecedented departure from the *Borello* test and announced a significant change in the law, adopting the "ABC" test for determining whether an individual is an employee under the Wage Orders. Notably, this test has never existed in any form of California law, either in statute or by a regulatory action. Additionally, while other state legislatures have enacted similar tests, this is the first time that such a test has been imposed by a court, without legislative approval.

Under this new "ABC" test, a person will be considered an independent contractor only if the hiring entity can prove **all** three of the following:

- (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; and,
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

This new test places in doubt the sustainability of a significant portion of independent contractor relationships in California and has the potential to cause substantial economic harm to hundreds of thousands of California citizens. Because of the rigidity of the test, specifically factors "B" and "C", most individuals who control their own schedule, control the projects or tasks that they take on, and control the way in which they perform the tasks or projects, will likely lose existing contracts and work opportunities because they perform work that is similar to that of the business entity retaining their services and/or are not in an independent business or trade of the same work being performed.

We believe it was inappropriate for the Court to issue this new test with broad reaching implications. The Court was limited to consideration of only the facts and arguments before it. The Court never received briefing, testimony, or other evidence regarding the impact the adoption of this new test would have on all the different industries not represented in the case, as well as the negative consequences it will create for California's economy.

Negative Consequences of the *Dynamex* **Decision:**

A. Dynamex Will Hurt Individuals Seeking Flexible, Independent, or Part-Time Work:

Traditional independent contractors are most common in industries where compensation is based on output rather than the number of hours worked; where workers work for multiple firms or switch firms frequently; or where a middleman/lead generator connects the contractor to the person or group receiving and paying for the service. Industries that commonly utilize independent contractors include, but are not limited to, real estate, healthcare, education, financial planning, agriculture, technology development, insurance,

¹Under *Borello*, each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case [¶] ... Besides the [traditional common law] "right to control the work," the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (2) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

construction, and transportation. Engineers, software developers, designers, technicians, doctors, lawyers, therapists, insurance agents, realtors, accountants, financial advisors, professional consultants, small businesses, writers, editors, drivers, artists, and other professions perform work as independent contractors. The entire franchise business model is based on an independent contractor relationship between a franchisor and franchisee. California has over 76,000 franchise locations that support nearly 730,000 jobs.

On June 7, 2018, the Bureau of Labor Statistics issued its Economic Release regarding Contingent and Alternative Employment Arrangements Summary and found that there are approximately 10.6 million independent contractors. The Economic Release also found the following:

"Independent contractors were more likely than those in traditional arrangements to be in management, business, and financial operations occupations; sales and related occupations; and construction and extraction occupations. In terms of industry, independent contractors were more likely than traditional workers to be employed in construction and in professional and business services.

Independent contractors overwhelmingly prefer their work arrangement (79 percent) to traditional jobs."

Effectively, *Dynamex* has the potential to eliminate the vast majority of independent contractors in California. This not only hurts the business model of a broad swath of industries and billions of venture capital dollars that are increasingly invested in businesses--but it also hinders California as a national leader in the innovation economy.

The policy reasoning of the Court in *Dynamex* reveals that it viewed independent contractor status as a threat to workers' rights. But the truth is that the question of employment classification exists at the intersection of important competing interests: On the one hand, the state's interest in protecting workers and, on the other hand every individual's personal liberty to contract and be in business for him or herself. As indicated by the Bureau of Labor Statistics Economic Release, individuals overwhelmingly prefer their arrangement as independent contractors, and the "ABC" test adopted by the Court jeopardizes that flexible work arrangement for Californians.

B. PAGA Litigation and Class Action Litigation Will Destroy California Businesses:

California's economic success is dependent on its ability to create an environment where job creation can flourish. *Dynamex* will neither help California's litigation environment nor promote businesses' ability to create jobs as it will drive up California employers' litigation costs.

Dynamex will undoubtedly serve to increase litigation costs of individual claims, class actions, and representative actions under the Labor Code Private Attorneys General Act (PAGA) against California businesses of all sizes. Businesses in Massachusetts have already seen a significant amount of litigation under the ABC test. Notably, Massachusetts does not have any statute comparable to PAGA that allows any employee to file a representative action for any Labor Code claim and stack penalty after penalty for each pay period. Employers will face a wave of litigation under PAGA with this decision that will destroy businesses or significantly reduce their economic growth.

These significant consequences to almost every industry in California were not before the Court when they made their decision in *Dynamex* and is why legislative action is necessary.

The Legislature, and Not the Courts, Should be Responsible for Crafting State-Wide Policy:

With one judicial opinion, nearly 30 years of established law has been overturned virtually overnight (and possibly retroactively as well). This decision from the Supreme Court takes California backwards into ideas about employment that have no relation to the modern workforce and that have never been considered by elected officials or agencies. The Industrial Welfare Commission, which was empowered to promulgate and amend the Wage Orders, including the Wage Order at issue in *Dynamex*, was defunded over 15 years ago. This means that, when the Wage Orders were finalized, the use of technology, platforms, and the flexible work arrangements that now exist in California's economy were never considered.

The Court was limited in the information it considered in its opinion, but the Legislature is not. Legislative discussions and hearings that invite all stakeholders from all sides of this discussion together could better identify a test for independent contractor versus employee that reflects California's economy today and provide a comprehensive solution that protects workers, yet also maintains California's innovation and growth.

The time to act is now, before work opportunities are destroyed, and before the trial lawyers start crushing businesses with an onslaught of litigation, which the business community is already experiencing in the short time since the decision was published. For all of these reasons, we respectfully request the Legislature and Governor's Administration to engage on this issue and suspend the application/impact of the *Dynamex* decision until all parties impacted by this decision can work together to develop a balanced test for determining independent contractor versus employee status that reflects the needs of California's economy and the workforce.

Sincerely,

California Chamber of Commerce

Acclamation Insurance Management Services

Allied Managed Care

American Council of Engineering Companies, California

America's Physician Groups

Association of California Life and Health Insurance Companies

Building Owners and Managers Association

California Alternative Payment Program Association

California Ambulance Association

California Association of Licensed Investigators

California Association of Winegrape Growers

California Building Industry Association

California Business Properties Association

California Business Roundtable

California Coalition of Travel Organizations

California Farm Bureau Federation

California Forestry Association

California Hospital Association

California Manufacturers and Technology Association

California News Publishers Association

California Professional Association of Specialty Contractors

California Restaurant Association

California Retailers Association

California Trucking Association

Camarillo Chamber of Commerce

Caviar

Civil Justice Association of California

Computing Technology Industry Association - CompTIA

DoorDash

El Dorado County Joint Chamber Commission

Electronic Transactions Association

Elk Grove Chamber of Commerce

Engine

Family Business Association of California

Financial Services Institute

Flasher Barricade Association

Folsom Chamber of Commerce

Glamsquad

Greater Coachella Valley Chamber of Commerce

Green Diamond Resource Company

Handy

International Council of Shopping Centers

International Franchise Association

Internet Association

Instacart

Lodi District Chamber of Commerce

Lyft

Mendocino Humboldt Redwood Companies

Murrieta Chamber of Commerce

NAIOP of CA - Commercial Real Estate Development Association

National Association of Mutual Insurance Companies

National Federation of Independent Business

Neighborhood Music School

Official Police Garages of Los Angeles

Oxnard Chamber of Commerce

Palm Desert Area Chamber of Commerce

Personal Insurance Federation of California

Postmates

Rancho Cordova Chamber of Commerce

Roseville Area Chamber of Commerce

San Diego Regional Chamber of Commerce

San Gabriel Valley Economic Partnership

Santa Ana Chamber of Commerce

Santa Maria Valley Chamber of Commerce

Sierra Pacific Industries

Simi Valley Chamber of Commerce

Southwest California Legislative Council

Taxicab Paratransit Association of California

TechNet

Torrance Area Chamber of Commerce

Tulare Chamber of Commerce

Uber

United Chamber Advocacy Network

West Los Angeles Chamber of Commerce

Western Growers Association

Western Manufactured Housing Communities Association

Western States Petroleum Association

Western States Trucking Association

Wildomar Chamber of Commerce

Wine Institute

cc: Diana Dooley, Office of the Governor

Kim Craig, Office of the Governor

Camille Wagner, Office of the Governor

David Lanier, Labor Secretary

The Honorable Ricardo Lara

The Honorable Tony Thurmond